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No. 701

In the Supreme Court of the United States

OCTOBER TERM, 1966.

CHARLES COLE, JESSE COWAN and AMERICO DePIETTO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States.

Petitioners, Charles Cole, Jesse Cowan and Americo DePietto, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, which affirmed the judgments of the District Court wherein Petitioners and others were convicted of conspiring to unlawfully import and sell narcotic drugs in violation of Title 21, Section 174, United States Code.

OPINION BELOW

No opinion was rendered in the United States District Court for the Northern District of Illinois, Eastern Division. The opinion of the United States Court of Appeals, thus far unreported, is reprinted in the appendix hereto, Appendix A, Pages 1a-11a.

STATEMENT OF JURISDICTION

The judgment and opinion of the Court of Appeals was entered on August 10, 1966. The Petition for Rehearing was denied, without opinion, on September 19, 1966.

The jurisdiction of this Court is invoked under Title 28, Section 1254 (1), U.S.C., 62 Stat. 928.

QUESTIONS PRESENTED

I.

Whether defense counsel were entitled to examine the Grand Jury testimony of the Government witness, and whether the Court of Appeals erred in not following the decision of this Court in *Dennis* v. *U.S.*, 16 L. Ed. 2d 973, Pp. 982-987, and in holding that defense counsel were not entitled to examine such Grand Jury testimony?

II.

Where a defendant is arrested at one place and taken therefrom to her second floor 14 room apartment, in the living room of which a co-defendant is arrested, and, where a thorough, three hour midnight, search of said apartment is conducted, and in the former defendant's bedroom dresser drawer her personal telephone books are discovered and seized, is such a general exploratory search

and seizure and the admission of said telephone books into evidence constitutionally valid?

III.

Are the gory details of the flight, chase and gun battle between an alleged co-conspirator, Nolan Mack, not on trial, and a Federal agent, the killing of said Nolan Mack by the agent and the agent's injuries received in said gun battle, admissible against the defendants on trial as acts allegedly committed by said Nolan Mack in furtherance of or pursuant to the alleged conspiracy to sell narcotic drugs?

IV.

Whether count thirty-nine, which alleged the commission of an offense in the language of the statute, where neither allege or set forth what specific act was prohibited or committed, informs petitioner, Charles Cole, of the nature and cause of the accusation against him as is constitutionally required?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,
Amendment IV:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall

have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT OF CASE

The three petitioners and nine other defendants were found guilty by a jury of conspiring to unlawfully import and sell narcotic drugs, in violation of Title 21, Section 174, U.S.C., under count one of the forty count indictment. Petitioner, Charles Cole, was also found guilty of using a telephone in facilitating the commission of an offense, the penalty for which is provided in Title 21, Section 174, U.S.C., in violation of Title 18, Section 1403, U.S.C., under count thirty-nine. Petitioners, Charles Cole and Americo DePietto, were sentenced to twenty years imprisonment and Petitioner, Jesse Cowan, was sentenced to ten years.

ARGUMENT AND REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

DEFENSE COUNSEL WERE ENTITLED TO EXAMINE THE GRAND JURY TESTIMONY OF THE GOVERNMENT WITNESS, AND THE COURT OF APPEALS, IN HOLDING OTHERWISE, DID NOT FOLLOW THE OPINION OF THIS COURT IN DENNIS.

The Court of Appeals did not cite or follow the opinion of this Court in *Dennis* v. *U.S.*, 16 L. Ed. (2) 973, Pp. 982-987, 86 S. Ct. 1840, or state any reason for not following it, and held, in direct opposition to this Court's holding in *Dennis*, that defense counsel were not entitled to examine the Grand Jury testimony of Government witness. The Court of Appeals simply ignored *Dennis*, and relied upon *Pittsburgh Plate Glass Co.* v. *U.S.*, 360 U.S. 395, 3 L. Ed. (2) 1323, and *U.S.* v. *Proctor & Gamble*, 356 U.S. 677, 2 L. Ed. (2) 1077. This Court discussed both these cases in *Dennis* but did not consider either of them authority for denying defense counsel the right to examine a Government witness' Grand Jury testimony, and held, 16 L. Ed. (2) 973, P. 987:

> "Because petitioners were entitled to examine the Grand Jury minutes relating to trial testimony of the four government witnesses, and to do so while those witnesses were available for cross examination, we reverse the judgment below and remand for a new trial."

In *Dennis*, the defendants moved the trial court "to require production for petitioners examination the Grand Jury testimony of four government witnesses." 16 L. Ed.

2d 973, P. 982. Defense counsel made an identical motion in the instant cause. Upon conclusion of the direct testimony of the Government witness, Beulah Greenlau, the trial court granted defense counsel's request for a defense counsel conference, (R. 224).[1] Upon conclusion of this defense counsel conference the following colloquy occurred, (R. 227, A. 46, 47)[2]

> "Mr. McDonnell: (Attorney for defendant DeMaro): I believe the defense is entitled to any minutes or notes taken during the course of her testimony before said grand jury. If this witness has testified before a grand jury, I believe the defense is entitled to any minutes or notes taken during the course of her testimony before said Grand Jury.
>
> The Court: On what basis?
>
> Mr. McDonnell: Judge, I think there will be conflicting statements between anything which she stated before the Grand Jury and she has presently told this Court and Jury.
>
> Mr. Bailey: On what basis?
>
> Mr. McDonnell: On the basis of my investigation of this entire matter, Judge.
>
> Mr. Bailey: There is no basis in the record for that.
>
> Mr. McDonnell: Well, I am advising the Court. I am certainly entitled to the minutes of the Grand Jury. If I am representing to the Court that my investigation reveals something diametrically opposed to what this witness has testified to, am I not entitled to inquire to see if she gave the same story previously to this under oath? After all, Judge, she is testifying to something which occurred four years previous to this date.

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[1] (R. 224) refers to the page of the typewritten transcript of the record on appeal.

[2] (A. 46-47) refers to the printed appendix of the typewritten record on appeal.

Mr. Bailey: I will represent to the Court at this time that the witness has testified before a Federal Grand Jury. * * *

Mr. McDonnell: There is no way I can tell if there is any inconsistency between the Grand Jury testimony of the witness and that which she might have testified to here.

The Court: Mr. Bailey has announced the correct procedure under the cases. First, it would have to be examined by me to determine.

Mr. McDonnell: Well, then, I request the Court to examine them."

This Court, in *Dennis,* 16 L. Ed. 2d 973, P. 988, flatly rejected the trial court's in camera examination of Government witnesses' Grand Jury testimony as a prerequisite to its examination by defense counsel, and further rejected the assumption that such testimony contained nothing beneficial to the defendants, and held:

"In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate. The trial judge's function in this respect is limited to deciding whether a case has been made for production, and to supervise the process."

In direct contravention of this Court's foregoing language and holding in *Dennis,* the trial court denied the motion for defense counsels' examination of the Grand Jury testimony of the Government witness, Beulah Greenlau, (R. 913-914, A. 111):

"The Court: * * * I have not yet ruled upon that original motion to submit the Grand Jury record—to make the Grand Jury record available. I have read it thoroughly. I have read the statement. I have

> heard the testimony here, and there is no material difference. Therefore, I deny the motion to make it available. I now return the Grand Jury * * * testimony of Beulah Greenlau to the District Attorney. * * *".

Under authority of *Dennis*, it was for the defense, and not the trial court, to determine the use and benefit to be derived from the witness' Grand Jury testimony, and from an examination of such testimony by the defense. The trial court erred in denying the motion for its production and examination by the defense.[3]

The trial judge recognized and stated that there was a variation between the trial and Grand Jury testimony of another Government witness, Barbara Mitchell, and invited defense counsel to cross examine her in this contradictory area, (A. 204-205). This witness and the Government admitted such contradictions, (A. 205-206, 210-211). Nevertheless, defense counsel were not allowed to examine her Grand Jury testimony either. We respectfully pray that this Petition for Writ of Certiorari be granted and that the judgments of conviction be reversed in the light of *Dennis*, as this Court did for identical reasons in *Leon* v. *U.S.*, 384 U.S. ....., 16 L. Ed. 2d 994, 86 S. Ct. 1912, (347 Fed. 2d 486); *National Dairy Products Corp.* v. *U.S.*, 384 U.S. ....., 16 L. Ed. 2d 993, 86 S. Ct. 1913, (350 Fed. 2d 321); *Konigsberg* v. *U.S.*, 384 U.S., ..., 16 L. Ed. 2d 997, 86 S. Ct. 1917, (354 Fed. 2d 1007);

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[3] The Government's contention in the Court of Appeals, made for the first time in opposition to rehearing, that the motion for examination of the witnesses' Grand Jury testimony was made only on behalf of defendant De Maro, and not these petitioners, is fallacious. See Appendix B, pages 11a-13a.

Worthy v. *U.S.*, 384 U.S. ....., 16 L. Ed. 2d 1000, 86 S. Ct. ....., (352 Fed. 2d 718).

In deference to the trial court, we point out that the trial court's ruling denying defense examination of the Government witness' Grand Jury testimony was made before this Court's contrary holding in *Dennis*. But the Court of Appeals affirmed this trial court ruling after *Dennis*. *Dennis* was decided on June 20, 1966. The Court of Appeals affirmed petitioners' judgments of convictions on August 10, 1966, without citing *Dennis*. But in *Leon*, *National Dairy Products*, *Konigsberg* and *Worthy*,[4] both the trial courts' denial of defense examination of Government witness' testimony and the Courts of Appeals' affirmances thereof were before the *Dennis* decision, and each of said cases was reversed and remanded in the light of *Dennis*. *A Fortiori*, petitioners' judgments should likewise be reversed and remanded.

II.

UNCERTAINTY AND CONFLICT INCREASINGLY EXIST BETWEEN THE FEDERAL CIRCUITS AS TO WHAT SEIZED PRIVATE PAPERS MAY BE ADMITTED INTO EVIDENCE. MOREOVER, ONCE AN ACCUSED IS UNDER ARREST A SUBSEQUENT SEARCH MADE AT ANOTHER PLACE, WITHOUT A WARRANT, IS NOT JUSTIFIABLE.

The defendant—alleged co-conspirator, Opal Cole, was arrested about 11:00 P.M. in her dress shop by Federal agents with the aid of city police officers. The dress shop was completely searched by the agents, even though they had no search warrant. Thereafter the agents handcuffed

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[4] The dates of the offenses, affirmances of the judgments in the Courts of Appeals and reversals by this Court in these cases are set forth in Appendix C, pages 14a-16a.

Opal Cole and her four customers and employees in the dress shop and therefrom, at gun point, marched them to her 2nd floor, fourteen room apartment some distance down the street. Upon the agents' arrival at the apartment, they arrested defendant-co-conspirator, La Fauncie Johnson, in the living room. A thorough search of the entire apartment was thereafter conducted from 11:45 P.M. until 2:00 A.M. There is no testimony in this record of what the agents were looking for in this exhaustive search. In a dresser drawer in Opal Cole's bedroom Federal agent Dayle found and seized Opal Cole's address books, which contained the name and telephone number of the co-defendant De Maro. Over all defendants' objections these address books were admitted into evidence, (A. 105-106).

The Court of Appeals adroitly overlooked the fact that Opal Cole was arrested and taken down the street at gun point to her apartment and justified the search of her apartment as "incidental to (Johnson's) arrest * * *" The Court's reasoning is obviously specious inasmuch as the address books were seized from Opal Cole's bedroom and were admitted into evidence against her and not against Johnson! The seizure of the books under these circumstances was clearly not incidental to the arrest of Opal Cole and should not have been admitted against her. *James* v. *Louisiana*, 15 L. Ed. 2d 30, 86 S. Ct. 151; 4th Amendment, United States Constitution.

The Court of Appeals erroneously and solely relied upon *Harris* v. *U.S.*, 331 U.S. 145, as authority for the admission into evidence of Opal Cole's books. Aside from the obvious distinction that in *Harris* the defendant was charged with the unlawful possession of the very contraband articles seized, the *Harris* decision itself recognized,

> "* * * the distinction between merely evidentiary materials, on the one hand, which may not be seized and those objects which may validly be seized including the instrumentalities and means by which a crime is committed * * *" 331 U. S. 145, 154.

One's address books are obviously "evidentiary materials," and equally obvious are not "instrumentalities * * * by which a crime is committed." This Court has never faltered in its adherence to the rule announced in *Boyd* v. *United States,* 116 U.S. 746, that one's private papers shall not be used to convict him. *Gouled* v. *U.S.,* 255 U.S. 298, *Marron* v. *U.S.,* 275 U.S. 192; *U. S.* v. *Lefkowitz,* 285 U.S. 452; *Abel* v. *U.S.,* 362 U.S. 217. Judge Learned Hand for the Second Circuit held in *U.S.* v. *Poller,* 43 Fed. 2d 911, that private papers are not admissible because,

> "* * * limitations upon the fruit to be gathered tend to limit the quest itself. * * *" 43 Fed. 911, 914.

While the Seventh Circuit relied upon *Harris* v. *U.S.,* 331 U.S. 145, in sustaining the instant seizure, Judge Sobeloff for the Fourth Circuit also relied upon *Harris* as authority for excluding similar evidentiary materials, In *Hayden* v. *Warden Maryland Penitentiary,* 363 Fed. 2d 647, (1966) he quoted from the majority in *Harris,* 363 Fed. 647, 652, and then commented:

> "The dissenting opinions of Justices Frankfurter, pp. 155, 165-166, 67 S. Ct. pp. 1104, 1108 and Murphy, pp. 183, 187, 188, 191, 67 S. Ct. pp. 1113, 1115, 1117, specifically recognized the distinction made by the majority between items subject to seizure and items which may not lawfully be seized. Thus, in the case dealing with the most extensive search ever validated by the Supreme Court, we find the Justices in the majority and those in dissent unanimous in condemning seizures by the police and the later use by the prosecution of articles having evidentiary value only."

And even within the Fourth Circuit itself an intra-circuit conflict in decisions exists. See dissent, Judge Bryan, 363 Fed. 2d 647, 655, and Chief Judge Haynsworth's "explanation" denying petition for rehearing in *Banc*, 363 Fed. 2d 647, 657. Only this Court can resolve these intra and inter circuit conflicts. We exhort this Court so to do.

Moreover, in *Harris*, this Court stated that the agents' search of the defendant's individually owned three room and bath apartment was for fruits of the crime for which Harris was arrested. In the instant case the exhaustive general exploratory search of the fourteen room jointly owned apartment was for nothing specific, but rather was for whatever evidentiary materials that might be discovered. *Harris* is no authority for the instant search.

III.

EVIDENCE OF THE FLIGHT, CHASE AND GUN BATTLE BETWEEN THE ALLEGED CO-CONSPIRATOR, NOLAN MACK, AND THE FEDERAL AGENT, AND THE AGENT'S INJURIES, WAS PREJUDICIAL AND INADMISSIBLE.

According to the Government's evidence Nolan Mack was a member of the alleged conspiracy to sell narcotic drugs. He was not named as a defendant in the indictment. He was killed prior to the indictment's return in a gun battle with a Federal narcotic agent, after his flight from the agent and in an attempt to avoid apprehension. The gory details of this high speed automobile chase, the gun battle and the minute details of the agent's injury inflicted in this shootout were highly prejudicial, had no probative value on the guilt or innocence of the defendants-petitioners on trial, and were inadmissible.

Only those acts that are committed pursuant to or in furtherance of the alleged conspiracy are admissible. A conspirator's efforts to avoid apprehension are not such acts. *Fiswick* v. *U.S.*, 329 U.S. 211, 91 L. Ed. 196; *Krulewitch* v. *U.S.*, 336 U.S. 440, 93 L. Ed. 790; *Lutwak* v. *U.S.*, 344 U.S. 604, 97 L. Ed. 593; *Gruenwald* v. *U.S.*, 353 U.S. 391, 1 L. Ed. 2d 931. Testimony of Nolan Mack's shootout with the agent, (A. 314-315, 323-327), was, therefore, inadmissible. *Krulewitch* v. *U.S.*, 93 L. Ed. 2d 790, P. 800:

> "On the theory that the law will impute to the confederate a continuing conspiracy to defeat justice, one conceivably could be bound by another's unauthorized and unknown commission of perjury, bribery of a juror or witness, or even putting an incorrigible witness with damaging information out of the way."

Nolan Mack's flight and gun battle was no more than an effort by him to avoid apprehension and defeat justice.

The Court of Appeals held that Mack's shootout episode was "relevant as proof of the conspiracy and the parts played therein by several of the defendants." Neither of the defendants on trial engaged in Mack's flight and attempted murder of the Federal agent and we respectfully submit, Mack's flight and attempted murder utterly failed to establish participation in the conspiracy by the defendants on trial or the parts played therein by them. From whom, when, where or how Mack obtained the drug found in his car is nowhere revealed in the entire record.

Of greater significance is the fact that the injured pursuing agent's goried detailed testimony of the glass particles in his eyes, bullet penetrating his eyeballs, his momentary blindness, the pointing of the gun by Mack at the agent's head, (A. 326-327), in no way tended to prove

the issues on trial. The injured agent's testimony needlessly, prejudicially and dramatically climaxed the Government's evidence and had absolutely no admissible evidentiary worth.

IV.

COUNT THIRTY-NINE OF THE INDICTMENT DID NOT ALLEGE THE COMMISSION OF AN OFFENSE AS REQUIRED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Count thirty-nine of the indictment alleged that petitioner, "Charles Cole, used a communication facility, to-wit: a telephone, in committing and in causing and facilitating the commission of, and attempting to commit an offense, the penalty for which is provided in Title 21, Section 174, U.S.C., in violation of Title 18, Section 1403, U. S. Code."

Count thirty-nine did not allege which of the several offenses of Title 21, Section 174, U.S.C. petitioner Charles Cole used a telephone to commit. The count therefore failed to advise and inform petitioner Cole of the nature and cause of the accusation against him, as is required by the Sixth Amendment to the Constitution of the United States. Petitioner Cole cannot plead a conviction or acquittal of count thirty-nine as a bar to subsequent proceedings brought against him for the commission of the same offense. Moreover, petitioner Cole could not prepare and present a defense to said allegations. Count thirty-nine was void under this Court's holdings in *Russell* v. *U.S.*, 369 U.S. 749, 8 L. Ed. 2d 240, Pp. 249-255; and *U.S.* v. *Cardiff*, 334 U.S. 174, 97 L. Ed. 200,P. 202.

The count did not allege, with the constitutionally required degree of certainty, when petitioner Cole used the telephone, what telephone he used, or how or in what manner he used it, to whom if any one he talked or whether he talked on the telephone to anyone. Petitioner Cole, filed a motion for a Bill of Particulars which sought to supply these deficiencies. The court summarily denied this motion. The lack of certainty, specificity and definiteness of count thirty-nine thereby went uncured. Surely the Government's furnishing of this requested information would not have in any way prejudiced the Government's case, nor given petitioner Cole any undue advantage in the trial. This Court has never exercisd its supervisory power in passing upon the validity of the exercise of a trial court's discretion in denying a Bill of Particulars. We submit that this is a case for this Court so doing.

The Court of Appeals quite erroneously relied upon the evidence to furnish the deficiency of the allegations of count thirty-nine, pointing out that the Government's evidence established that several telephone conversations were made by petitioner Charles Cole. But even so, it is absolutely undiscernible to which of these conversations count thirty-nine refers. It is for this reason of vagueness, uncertainty, indefiniteness and failure of factual allegations that cause count thirty-nine to be constitutionally fatally defective in not informing petitioner Charles Cole, of the nature and cause of the accusation and the evidence that he would be called upon to meet on the trial, *U.S.* v. *Russell*, 369 U.S. 749.

We pray that this petition be granted.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 14714, 14722, 14723, 14737, 14861

SEPTEMBER TERM, 1965
APRIL SESSION, 1966

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
OPAL COLE, *et al.*,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

AUGUST 10, 1966

Before SCHNACKENBERG, KNOCH and KILEY, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Opal Cole and several other defendants[1] have appealed from a judgment of conviction entered by the district court on the verdict of a jury, after a trial on a 40-count indictment which named them and other persons as co-conspirators.

[1] Charles Cole, Jesse Cowan, Americo Di Pietto, James Isaacson, LaFauncie Johnson, Kirsten Spencer, Angelo Passini, Joe Battiato, Michael De Maro, Frank Carrioscia, and Zedrick Cameron. Subsequently the appeals of Cameron, Spencer, Isaacson, Battiato and Carrioscia were dismissed.

The theory of the government has been that the numerous defendants named were members of a conspiracy trafficking in narcotics, and that the conspiracy operated on three levels—suppliers, distributors and salesmen.

From our analysis of the voluminous trial record, we have come to the conclusion that there was evidence introduced which supports the theory of the government that defendants Di Pietto, De Maro, Ted De Rose, Battiato and Passini were suppliers of heroin who made available to defendants named as distributors large amounts of that drug. The suppliers allocated territories, consigned quantities of the drug, packaged wholesale amounts, and collected money from the distributors. The evidence tended to show that on the south side of Chicago defendants Opal and Charles Cole, together with Nolan Mack (who met death four days prior to the return of the indictment), were distributors.[2] Defendant LaFauncie Johnson was a seller and messenger for the Coles.

On December 12, 1961, about 11 P.M. Opal Cole was arrested by agent Hughes, who took her to her apartment, using her key for entrance. Finding Johnson in the living room, he arrested him. Incidental to the arrest of Johnson, a search was made and Opal Cole's notebooks were seized. Because of entries therein, they were clearly admissible as instrumentalities used in the crime charged in the indictment.

On October 25, 1963, De Maro and Battiato had a talk on a street corner at about 7:30 P.M. and an hour later, Mack picked up Battiato at the corner and drove to a building at 533 Belden, where Battiato lived and which he entered, returning a minute later to the car. He then gave Mack a package and Battiato went into his apartment and counted several bundles of money.

Mack met his death in an automobile on the same evening (October 25, 1963), as he was pursued by federal

[2] There was evidence that on the west side the distributors were Cowan, Carrioscia, Isaacson, Charles Sparkman and Cameron.

narcotics agents on a main highway through Chicago. During the chase he was shot by his pursuers and heroin was then found in his car. These circumstances were relevant to explain the condition of the heroin and the absence of the container in which Mack originally received the heroin.

1. Counsel for defendant De Maro, following the examination of Beulah Greenlaw, a government witness, requested the trial court to examine her testimony before the grand jury to determine whether the grand jury's minutes of that testimony should be turned over to counsel for use on cross-examination. The court examined the minutes and refused to turn them over to De Maro's counsel.

Defense counsel stated to the court that he believed that he was entitled to any minutes or notes taken during the course of the hearing of testimony before the grand jury, adding:

> "Judge, I think there will be conflicting testimony between anything which she stated before the Grand Jury and she has presently told this Court and Jury."

Government counsel admitted that the witness had testified before the grand jury. Defense counsel stated:

> "There is no way I can tell if there is any inconsistency between the Grand Jury testimony of the witness and that which she might have testified to here."

Government counsel handed the grand jury minutes to the court, which examined them but refused to turn them over to defense counsel.

We cannot say that defense counsel laid a basis for the inspection of the grand jury proceedings by the trial court. The most that can be said is that the record reveals a hope by the defense attorney that something in the testimony of witness Greenlaw before the grand jury was inconsistent with her testimony upon the trial. This is not

sufficient to cause us to override the position taken by the district court here.

In *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395 (1959), the court said, at 398:

> "Petitioners concede as they must, that any disclosure of grand jury minutes is covered by Fed. Rules Crim. Proc. 6 (e) promulgated by this Court in 1946 after the approval of Congress. In fact, the federal trial courts as well as the Courts of Appeals have been nearly unanimous in regarding disclosure as committed to the discretion of the trial judge. Our cases announce the same principle, and Rule 6 (e) is but declaratory of it. As recently as last Term we characterized cases where grand jury minutes are used 'to impeach a witness, to refresh his recollection, to test his credibility and the like' as instances of 'particularized need where the secrecy of the proceedings is lifted discretely and limitedly.' *United States* v. *Procter & Gamble*, 356 U.S. 677, 638 (1958).
>
> "Petitioners argue, however, that the trial judge's discretion under Rule 6 (e) must be exercised in accordance with the rationale of *Jencks;* namely, upon a showing on cross-examination that a trial witness testified before the grand jury—and nothing more—the defense has a 'right' to the delivery to it of the witness' grand jury testimony.
>
> "This conclusion, however, runs counter to a 'long-established policy' of secrecy, *United States* v. *Procter & Gamble, supra*, at 681, older than our Nation itself. * * *"

2. Eighteen defendants went on trial. The indictment named twenty-two defendants and thirty-five unindicted co-conspirators.[3] The structure of the conspiracy and con-

[3] One defendant was granted a severance for reasons of ill health. A directed verdict of acquittal was given one defendant and four others were acquitted by the jury. Of the twelve found guilty, the appeals of seven are now before us.

nection of the defendants therewith are shown largely by the testimony of four government witnesses, Barbara Mitchell, Houston Garner, James Faris and Charles Sparkman.

The evidence showed that Mitchell bought heroin from the Coles, Di Pietto and De Maro at a meeting where the distribution of narcotics and Mack's participation were discussed, and also that Passini received $5,000 from Opal Cole in payment for narcotics.

According to his testimony, Garner bought heroin from Opal Cole which was delivered to Garner by LaFauncie Johnson. He also saw De Maro with Opal during negotiations for the purchase by Garner of a wholesale quantity of heroin.

Faris said he purchased heroin from Cowan. In fact he went with Cowan to a meeting attended by Carrioscia where distribution of narcotics was discussed.

Sparkman testified he bought heroin from Carroscia.

The Coles, Carrioscia and Cowan were distributors from whom the four government witnesses testified they bought heroin. Mack was also a distributor. These persons all obtained heroin from Di Pietto's group which included De Maro, De Rose, Passini and Battiato.

We need not encumber this opinion with the details marking the day by day transactions beginning in the spring of 1961 in which these four government witnesses, according to their own testimony, and as corroborated by other facts and circumstances in evidence, became associated with other conspirators in carrying out the extensive trafficking in narcotics shown by the record before us.

We can sum it up in the words of government counsel who have said in their brief:

> "In the instant case, the object of every conspirator was to sell the narcotics made available by the suppliers to the distributors so that the operation could continue. Just as the quality of the heroin was diluted

by each on the way down, so the profits were skimmed by each on the way up."

Even though the contacts between the different conspirators as among themselves varied from day to day, if they were shown by the evidence to the satisfaction of the jury to have been engaged in a common plan to violate the narcotics acts, the evidence in the case at bar is sufficient to support a conviction on the indictment upon which defendants were tried. As was said in *Poliafico* v. *United States*, 6 Cir., 237 F. 2d 97, 103 (1956), cert. denied 352 U.S. 1025:

> "• • • The fact that one such supplier did not have dealings with another supplier does not matter. If each performs the same role at successive stages for the same ends, and both knew and participate in the plan of the others to buy and sell heroin at a profit, each is guilty as a conspirator. *United States* v. *Tramaglino*, 2 Cir., 197 F.2d 928. • • •"

Moreover, there having been competent proof of a conspiracy to violate the narcotics acts, none of the conspirators is in a position to object to the introduction into evidence of the acts of the co-conspirators, even though they were not all present on each occasion. Thus in *United States* v. *Iacullo*, 226 F.2d 788, 793 (1955), cert. denied 350 U.S. 966, we said:

> "As to the conspiracy count, proof of the September 18, 1953 offense was admissible as corroborative of other evidence received to prove that count, because the pattern of that transaction bore a strong resemblance to the pattern of other transactions proved to have taken place in carrying out the conspiracy. • • •"

Again, in *United States* v. *McCartney*, 264 F.2d 628 (1959), cert. denied 361 U.S. 845, we said, at 631:

> "• • • Evidence, even of other criminal acts is admissible when so blended or connected with the

crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances thereof. United States v. Wall, 7 Cir., 1955, 225 F.2d 905; United States v. Crowe, 7 Cir., 1951, 188 F.2d 209."

While it is true that Mack was an unindicted co-conspirator (having died before the indictment was returned), the fact remains that defendants were on trial for conspiring with Mack to sell narcotics. Thus Mack's actions, including the disposal of the contents of a bag on an expressway as he drove his car with agents in pursuit, and the presence of heroin in his car, are relevant as proof of the conspiracy and the parts played therein by several of the defendants.

3. Counsel for defendants made a motion to suppress exhibits 8 and 9, described as "two address indexes". The motion was denied and it is now claimed that this was error, being a violation of the fourth amendment of the constitution of the United States.

We find that the record reveals that narcotics agent Hughes testified that on December 12, 1961 he was advised that warrants had been issued for the arrest of Opal Cole and her brother, defendant LaFauncie Johnson, who both lived in Chicago, and that she operated a dress shop. Thereupon with the help of police officers, Hughes arrested Opal Cole at her shop and the group then went to her apartment which Hughes opened with a key supplied by her. Johnson was there alone and was arrested by Hughes. Incidental to his arrest a search was made which resulted in the finding by agent Doyle, who had recently arrived, of two address books (exhibits 8 and 9).

In *Harris* v. *United States,* 331 U.S. 145 (1947), the court said, at 150:

"The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant. Search and seizure incident to lawful arrest is a

practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States and of the individual states."

We hold that the facts in the case at bar bring it within the rule announced in *Harris*. Such address books are admissible in this case. *United States* v. *Owens*, 7 Cir., 346 F.2d 329, 332 (1965).

4. Defendant De Maro insists that at the trial evidence was received as to a sale of narcotics by defendant Carrioscia on October 29, 1963, which was after the indictment was returned and ordered suppressed until 11 P.M. Counsel for De Maro cites no controlling authority to support his contention that the return of an indictment, particularly a suppressed indictment, terminates a conspiracy and therefore ends the vicarious responsibility of the conspirators. We find it immaterial that some defendants named in an indictment which had been returned continued to carry on their business as usual after its return. With regard to those defendants the conspiracy was not terminated until their arrests.

As the court said in *United States* v. *Cohen*, 2 Cir., 145 F.2d 82, 89 (1944), cert. denied 323 U.S. 799:

> "• • • So too as to declarations of the various confederates. In accordance with the well-settled rule these were all admissible while the 'scheme' was in process of realization, provided they were in furtherance of it. Nor would it make any difference that they were after the indictment was found, if the 'scheme' had not yet ended; because, while of course the crime must be complete in all its elements before indictment found, there may be evidence thereafter which tends to prove its past existence. • • •"

5. Defendant Passini contends that his rights under the sixth amendment of the United States constitution were violated by the court's denial of his motion for a severance or continuance.

The record shows that Passini assured the court that he agreed that Mr. Lewis, his attorney, might be excused and that attorney McDonnell, during his absence, would represent Passini. The court was later advised that attorney Lewis had been taken to a hospital for treatment and Passini agreed to continue with Mr. McDonnell. Thereafter the court granted leave to Passini to act as co-counsel for himself. Thereafter Passini asked for a continuance or a separate trial. After extended colloquy between the court, Passini and counsel, the court designated attorney McDonnell to represent Passini and that representation was refused. This did not satisfy Passini, who wanted his own lawyer and was willing to wait for the return of Mr. Lewis after his illness was over. Finally the court instructed Passini to be seated and proceed to represent himself. After further spirited colloquy between Passini and the court, Passini agreed that McDonnell would represent him for the balance of that day.

Discussions between McDonnell and Passini occurred thereafter but were fruitless in satisfying Passini.

In calling our attention to certain testimony, the government has pointed out that on

> "September 16, 1963, when Battiato, De Maro and Passini were concerned about a strange car parked in the neighborhood during a transfer of heroin to Carrioscia, it was Passini who suggested that Carrioscia be contacted. • • • Passini's name was not mentioned from the witness stand by any witness during the time Mr. Lewis was absent from the courtroom."

and that Passini was in no way prejudiced by the absence of his counsel.

We hold that the court committed no error in handling this difficult situation. We further hold that no statements made by the court were prejudicial to Passini and that he was not denied a fair trial.

6. Counsel for Charles Cole argue that count 39 of the indictment does not allege his commission of an offense as required by the sixth amendment of the constitution of the United States. The basis for the conviction of Cole for violation of Title 18 U.S.C. § 1403 under that count is the testimony of Mildred McLean that, in accordance with Cole's telephone call to her in early 1960, she went to a location mentioned by him and met "Mickey" Carrioscia and received a package of heroin. Similar conversations occurred between them in April and August, 1960. Count 39 also incorporates Title 21, U.S.C. § 174, which prohibits unlawful trafficking in narcotics, already reflected in this opinion. This attack on count 39 must fail.

Moreover, the district court did not commit error in denying Cole's motion for a bill of particulars.

7. To avoid an unnecessary protraction of this opinion, we state that, to the extent that any one of the numerous points raised by defendants herein has not been specifically dealt with in this opinion, we conclude that none of said points finds support either in the record or in the law applicable thereto.

Accordingly the judgment from which these appeals were taken is affirmed.

JUDGMENT AFFIRMED.

APPENDIX B

The Government was in obvious error in its contention, urged for the first time in the Court of Appeals in opposition to rehearing, that the motion for examination of the witnesses' Grand Jury testimony was made only on behalf of defendant DeMaro, and not these petitioners. Firstly, the Court of Appeals failed to follow *Dennis* even as to the defendant DeMaro and affirmed his conviction. Secondly, the Court of Appeals did not rely on this ground as to these petitioners or as to defendant De Maro in not following *Dennis*. Thirdly, there was an agreement between Government and defense counsel and the trial court that during the trial on the forty count indictment with a conspiracy count, in which all eighteen defendants on trial were charged and represented by ten lawyers, that each defense counsel need not make repetitious objections or motions, that each defense counsel would be bound by and have the benefit of all motions, objections and rulings except where expressly disavowed, (A. 37-38). This agreement was followed even in the selection of the jury and the opening statements. Volume one of the transcript, April 17 and 20, 1964, pages 110-127, some of which is omitted from the printed Appendix, not anticipating that such an erroneous and frivolous contention ever would be urged by the Government, reveals that several defense counsel objected to and disavowed the opening statement of defendant Passini. (R. 124-125):

> "The Court: And Mr. McDonnell disavowed his opening statement.
>
> Mr. Pincham: I did not know that it (the agreement) would apply to the questions of witnesses and what have you.
>
> The Court: * * * We did in the choosing of the jury. I will now extend it to the questioning of wit-

nesses—you have the right to take advantage of it without mentioning, but if you do not want it, you have a right to disavow it."

The fact of the matter is, on many occasions during this protracted trial, with the consent of the defendants, their attorneys, the Court and the Government and upon the Government informing a defense counsel that no evidence would be presented on a certain day as to such defense counsel's client, such defense counsel did not appear and defense counsels who were present were designated by the court and approved by the defendants to represent that defendant whose counsel was absent.

And on motion of defendant Opal Cole to suppress her address books seized from her bedroom dresser drawer in her apartment, after her arrest at her dress shop, heretofore discussed under Argument, Point II of the Petition, pages 9-12, the trial court stated, (A. 105):

"Under our ruling, every lawyer and every defendant here stands joined in it, unless they disavow it."

Moreover, in many instances, the charge being conspiracy, several defense counsel argued to the court on matters that did not directly affect his client. One such instance was on motion and argument, successfully made by the attorney for Charles Cole and Jesse Cowan, to quash a search warrant and suppress evidence seized from the defendant Opal Cole,* who was represented by another attorney. (A. 107-109, 143; Vol. IV of the Transcript of the record on appeal, April 27, 28, 1964, P. 1349). Prior to sustaining this motion, the trial court stated, P. 1351:

---

*This was not the motion or evidence mentioned under Argument, II, pages 9-12.

"Leave granted to file it, and all parties—it goes to the benefit of all parties."

Finally, it is perfectly clear from the posture in which the request for Greenlaw's Grand Jury testimony was made and from the wording of the request itself, that it was made on behalf of all defendants. Upon conclusion of her direct testimony, the court suggested that defense counsel Papanek cross examine her first, inasmuch as the greater portion of her direct testimony was about his client, the defendant Opal Cole. (Vol. 1 of Transcript, April 17, 20, 1964, pp. 224-226). Mr. Papanek stated:

"Your Honor, if we may have among counsel just a five minute conference."

The Court granted the request. Upon conclusion of the conference, Mr. McDonnell, attorney for Defendant De Maro, stated, (R. 227, A. 46):

"I believe *the defense is entitled* to any minutes or notes taken during the course of her testimony before said Grand Jury. If this witness has testified before a Grand Jury, I believe the *defense is entitled* to any minutes or notes taken during the course of her testimony before said Grand Jury." (Italics added).

The remaining portion of Mr. McDonnell's motion is set forth in the argument of this Petition P. 6-7. It is quite apparent that the motion was on behalf of all defendants. The Court denied the request. It is absurd to suggest that all ten other defense counsel should have needlessly repeated the same motion, made on all their behalfs and just denied.

Finally, in the Court of Appeals the appeals were consolidated and argued together. Here, too, it is absurd to suggest that each appellant should have each repeated all arguments relied upon for reversal.

APPENDIX C

In *Leon* v. *U.S.*, 347 Fed. 2d 486, the offenses were allegedly committed from March 31, 1962 to April 4, 1962. The trial court denied defense counsel's request for the court's in camera inspection of a Government witness' Grand Jury testimony. On April 22, 1965, the Court of Appeals affirmed on the grounds that the witness' testimony was corroborated "and no inconsistencies appeared." 347 Fed. 2d 486, P. 490. Rehearing was denied on July 30, 1965. In the light of *Dennis*, on June 20, 1966 this Court reversed the judgment of conviction and remanded the cause. 16 L. Ed. 2d 994.

In *National Dairy Products Co.* v. *U.S.*, 350 Fed. 2d 321, count one of the indictment alleged the commission of a conspiracy "beginning in or about January, 1955 and continuing until the return of this indictment, September 16, 1959." The Government was permitted to use the witness' Grand Jury testimony to refresh the recalcitrant witness' memory. Defense counsel's motion for examination of the portion of the witness' Grand Jury testimony used by the Government for the aforesaid purposes was denied. The defendants contended that the Government in reality used the witness' Grand Jury testimony for impeachment purposes and as substantial evidence and that defense counsel was therefore entitled to examine it. On August 27, 1965, the Court of Appeals affirmed on the grounds that the Government's use of the witness' Grand Jury testimony was confined to refreshing the witness' recollection, and that, therefore, defense counsel was not entitled to examine it. Rehearing was denied on

September 23, 1965. In the light of *Dennis,* this Court on June 20, 1966 reversed and remanded. 16 L. Ed. 2d 993, 86 S. Ct. 1913.

In *Worthy* v. *U.S.,* 352 Fed. 2d 718, the two narcotic offenses were allegedly committed on May 20, and June 11, 1964. "At the close of the Government's case, the defense made a motion, never renewed thereafter, to examine the Grand Jury minutes for possible inconsistencies between the police officer's testimony there, and that which he had just given at the trial." The trial judge denied the motion. On October 7, 1965, the Court of Appeals affirmed and denied rehearing on December 6, 1965. Again, in the light of *Dennis,* this Court on June 20, 1966 reversed and remanded. 16 L. Ed. 2d 1000.

In *U.S.* v. *Konigsberg,* 354 Fed. 2d 1007, the trial court's ruling denying defense examination of the Government witness' Grand Jury testimony was affirmed on January 27, 1966, which affirmance was reversed by this Court on June 20, 1966. 16 L. Ed. 2d 997, 86 S. Ct. 1917.

In the instant cause, count one alleged the conspiracy to have been committed from January 1, 1960 to and including the date of the return of the indictment, October 29, 1963. The other thirty-nine counts, in which various but not all defendants were charged, alleged the offenses to have been committed in the years 1960, 1961, 1962 and 1963. This Court decided *Dennis* on June 20, 1966. Thereafter the Court of Appeals affirmed the instant judgments on August 10, 1966 and denied petitioners' Petition for Rehearing on September 19, 1966. Under this Court's foregoing decisions and rulings in *Dennis, Leon, Worthy, National Dairy Products Co.* and *Konigsberg,* we respectfully submit that petitioners' judgments of conviction should also be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 682

ANGELO PASSINI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 701

CHARLES COLE, JESSE COWAN AND AMERICO DE PIETTO, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 975 Misc.

MIKE DE MABO

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 365 F. 2d 57.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1966. Petitions for rehearing on behalf of petitioners Passini and De Maro were denied on September 15, 1966. A petition for rehearing on behalf of petitioners Cole, Cowan and De Pietto was denied on September 19, 1966. Passini's petition for a writ of certiorari (No. 682) was filed on October 14, 1966; and the petition of Cole, Cowan and De Pietto (No. 701) was filed on October 19, 1966. Mr. Justice Clark extended petitioner De Maro's time for filing to November 14, and his petition (No. 975 Misc.) was filed on November 7, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner Passini (No. 682) presents the following questions:

1. Whether the evidence was sufficient to support his conviction.

2. Whether he was denied the effective assistance of counsel.

All petitioners, except Passini, raise the following two questions:

3. Whether the failure of the trial judge to turn over to the defense minutes of the grand jury testimony of one witness required reversal of their convictions.

4. Whether it was error for the trial court to admit evidence of the flight of a co-conspirator.

In addition, the petition in No. 701 raises the following questions:

5. Whether the trial court properly admitted evidence seized incident to an arrest of a co-defendant.

6. Whether count thirty-nine of the indictment (against Cole alone) was insufficient as matter of law.

STATUTES INVOLVED

21 U.S.C. 174 provides in part:

> Whoever fraudulently or knowingly imports or brings into the United States or any territory under its control * * * or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug * * * or conspires to commit any of such acts * * * shall be imprisoned not less than five or more than twenty years * * *.

18 U.S.C. 1403 provides in part:

> Whoever uses any communication facility in committing or in causing or facilitating the commission of, or in attempting to commit, any act or acts constituting an offense or a conspiracy to commit an offense the penalty for which is provided in * * * (21 U.S.C. sec. 174) * * * shall be imprisoned not less than two and not more than five years * * *.

STATEMENT

The five petitioners and eleven other defendants were convicted in the United States District Court for the Northern District of Illinois of importing and sell-

ing narcotics, and conspiring to do so, in violation of 21 U.S.C. 174. In addition, petitioner Cole was convicted of using a telephone in facilitating the sale of narcotics, in violation of 18 U.S.C. 1403. On June 29, 1964, petitioners Cole, De Maro, and De Pietto were sentenced to imprisonment for twenty years, petitioner Cowan for ten years, and petitioner Passini for five years. The court of appeals affirmed the convictions.

The evidence established that the defendants were members of a conspiracy trafficking in narcotics, which operated on three levels—suppliers, distributors and salesmen. Petitioners De Pietto and De Maro were suppliers, and petitioners Cole and Cowan were distributors. None of these petitioners questions the sufficiency of the evidence against him.

Petitioner Passini, who does attack the sufficiency of the evidence to convict him, was shown to have engaged in the following activities: On August 22, 1961, Barbara Mitchell and Opal (Pat) Cole drove to the parking lot of a Chicago motel. Passini, whom Barbara Mitchell did not see approach, entered the rear seat of the automobile (Tr. 2633–2637), received $5,000 from Opal Cole in return for a package, and commented that "the stuff was so strong he had to put on a mask while mixing and had to turn the fan on" (Tr. 2428–2430).[1] After the money was passed, Barbara Mitchell turned around in the front seat and looked at Passini. After some discussion of the narcotics busi-

[1] "Tr." designates the Transcript of Trial Proceedings (which we are lodging with the Clerk of this Court) and "J.A." designates petitioners' Joint Appendix.

ness, Passini left the car. Barbara Mitchell observed Passini taking just a few steps away from and to the rear of the vehicle (Tr. 2640–2642).

On September 16, 1963, Frank Carrioscia told Sparkman (a government informer) that he would have narcotics for him later on in the evening. At about 9:00 that evening Carrioscia, Joe Battiato and petitioner Passini met in Andy's Grill. Shortly afterwards, Battiato and Carrioscia left the grill, and Battiato gave Carrioscia a brown paper bag. Carrioscia then proceeded to meet Sparkman and gave him the brown paper bag, which contained heroin (Tr. 3682–3695). In the meantime, Battiato returned to Passini in Andy's Grill, and the following conversation was overheard by an agent seated at a nearby table (Tr. 4211–4213, 4439):

> BATTIATO. We are in trouble.
>
> PASSINI. What is wrong?
>
> BATTIATO. There is a white Caddy convertible sitting over by the meet spot. That is the second time I saw it. It pulled right out behind Frank.
>
> PASSINI. Maybe we ought to call Frank?
>
> DE MARO. No, Frank hasn't had time to get back to the west side yet. We will go over there.

On September 27, 1963, Passini was observed walking towards defendant Joe Battiato's residence, carrying a brown paper package under his arm (Tr. 3845). Battiato met Passini, and they both entered the apartment building. A few minutes later, Battiato left the building and gave Frank Carrioscia the package (Tr. 3845–3846). Passini went to Andy's Grill at

about 8:45 p.m., where an agent seated in the bar heard the following conversation between Passini, Ted De Rose and Mike De Maro (R. 3950):

> PASSINI. Frank only showed up with a thousand.
>
> DE ROSE. What about the other three hundred?
>
> PASSINI. Frank will be here in a few minutes, Mike. You can talk to him yourself.

At about 9:45 that evening, Frank Carrioscia met Mike De Maro and Joe Battiato, and gave De Maro a stack of bills, saying, "Here's the grand." (Tr. 3706–3708). Later that evening, Carrioscia transferred heroin to the informer, Sparkman (Tr. 3711–3714).

ARGUMENT

1. Petitioner Passini contends that there was insufficient evidence to sustain his conviction on the conspiracy count, alleging that the witness Barbara Mitchell was mistaken in her identification of him as the person who received $5000 from Opal Cole and that agent Aruslan was mistaken in identifying him as the person, carrying a brown paper bag, who met Battiato on September 27 (No. 682, Pet. 18, 34–35, 36).[2]

---

[2] Agent Aruslan's testimony is reported as follows (J.A. 267; Tr. 3845): "A few minutes after that Battiato came back out, stood in front, smoked a cigarette and walked up and down. Several minutes later Angelo Passini walked west toward Battiato's residence. *Ted DeRose* was walking with a noticeable limp and he was carrying a brown paper package under his left arm. Angelo Passini met Battiato in the front of the building and they both entered." [Emphasis added.]

It is apparent from the context that the reference to "Ted DeRose", instead of "Angelo Passini" was either a slip of

These issues of credibility, resolved unfavorably to Passini by the jury, present no question warranting review. *Cramer* v. *United States,* 325 U.S. 1. Although there was no direct proof of an "agreement" to distribute narcotics, the agreement can be inferred from circumstantial evidence. *Krulewitch* v. *United States,* 336 U.S. 440. Considering all the activities of petitioner, the jury could properly conclude beyond a reasonable doubt that Passini conspired to traffic in narcotics.

2. Passini was represented at trial by attorney Melvin B. Lewis. Prior to the impanelling of the jury, Passini moved the court that he be allowed to represent himself together with his attorney. The trial court granted the motion, advising that Passini was to act with the same decorum as the attorneys present in the courtroom (J.A. 4). On the seventh day of the trial (which lasted a period of seven weeks) Mr. Lewis felt ill and asked the court if he might be temporarily excused. After the trial court was advised that another attorney, Mr. McDonnell, would continue Passini's defense with Passini's consent, Mr. Lewis was excused (Tr. 490–491). It was

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the tongue or a reporter's error. On cross-examination by Passini's counsel, Aruslan stated that he could distinguish between Passini and De Rose—Passini had a limp, De Rose had a peculiar walk (Tr. 3884). In another answer (which was subsequently stricken as not being responsive to the question put), Aruslan stated, "That was Angelo Passini walking west on south side of Belden, with—I stated with a noticeable limp, carrying a brown paper bag under his left arm, meet Joe Battiato in front of his apartment building, and both entered" (Tr. 3938–3939).

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thereafter determined that Mr. Lewis had suffered a mild heart attack, and that he would be hospitalized for an undetermined time (Tr. 541). With the consent of Passini, Mr. McDonnell continued representation of Passini through the rest of the proceedings of that day (Tr. 545). The following day, the uncertainty of the length of Mr. Lewis' stay in the hospital was again reported to the court (Tr. 691). Passini's motion for a continuance or severance was denied. He refused to accept the services of any of the attorneys present in the courtroom representing other defendants (Tr. 694–697), but again consented to representation by McDonnell for the remainder of that day (Tr. 702–703). The following day, another motion by Passini for continuance was denied, and Passini refused the appointment of any attorneys present in the courtroom (Tr. 921–923). The court then released Mr. McDonnell, of whose services Passini disapproved, from further representation (Tr. 923). The government moved the court for a short continuance in order to obtain the services of an independent attorney for Passini. Passini refused the offer, stating that he would accept only Mr. Lewis as his attorney (Tr. 945–948). Several other motions for a continuance were denied, and the court directed another attorney, Mr. Devine, to protect Passini's interest, whether or not Passini agreed (Tr. 976–977). Mr. Lewis returned six trial days after he was taken ill (Tr. 1829–1830).

During Mr. Lewis' absence, no evidence was introduced that implicated petitioner Passini, who was charged only in the conspiracy count. The testimony

relating to Passini was given by Barbara Mitchell, and agents Valentine, Aruslan, Jackson and Patch. Mr. Lewis either cross-examined, or had the opportunity to cross-examine, each of these witnesses.

Petitioner does not, and cannot, show that he was prejudiced by Mr. Lewis' absence. Rather he contends that absence of counsel *ipso facto* requires reversal. It is evident, however, that petitioner was not really deprived of counsel but sought to use the temporary illness of his attorney as a means of escaping trial. The trial court properly protected Passini's interests in this situation and did not abuse its discretion in refusing to grant a continuance. *United States* v. *Bentvena,* 319 F. 2d 916 (C.A. 2); *United States* v. *Dardi,* 330 F. 2d 316 (C.A. 2); *Danziger* v. *United States,* 161 F. 2d 299 (C.A. 9), certiorari denied, 332 U.S. 769.

3. Petitioners, other than Passini, contend that it was reversible error to refuse to turn over to the defense certain grand jury testimony of the witness Beulah Greenlaw. On direct examination, the testimony of Mrs. Greenlaw implicated several of the original co-defendants as dealers in narcotics. Of the parties before this Court, however, only petitioners Cole and De Maro were mentioned. The witness testified that in July or August, 1960, at the direction of Opal Cole, she carried money in a brown paper bag to petitioner Cole, "because he was the big man" (Tr. 203). About three days later, she was sent on a similar mission, again giving money to petitioner Cole in a brown paper bag (Tr. 204–205). She further testified that on three occasions during the month of Au-

gust 1963, she received heroin from petitioner De Maro (Tr. 206–218).

Upon completion of the witness' testimony on direct examination, the following colloquy occurred between counsel and the court (Tr. 227–232):

> Mr. McDONNELL. * * *
>
> If this witness has testified before a grand jury, I believe the defense is entitled to any minutes or notes taken during the course of her testimony before said grand jury.
>
> The COURT. On what basis?
>
> Mr. McDONNELL. Judge, I think there will be conflicting statements between anything which she stated before the grand jury and she has presently told this court and jury.
>
> Mr. BAILEY. On what basis?
>
> Mr. McDONNELL. On the basis of my investigation of this entire matter, Judge.
>
> Mr. BAILEY. There is no basis in the record for that.
>
> Mr. McDONNELL. Well, I am advising the court. I am certainly entitled to the minutes of the grand jury. If I am representing to the court that my investigation reveals something diametrically opposed to what this witness has testified to, am I not entitled to inquire to see if she gave the same story previously to this under oath? After all, Judge, she is testifying to something which occurred four years previous to this date.
>
> * * * * *
>
> Mr. BAILEY. I will represent to the court at this time that the witness has testified before a federal grand jury. * * *

> Mr. McDONNELL. There is no way I can tell if there is any inconsistency between the grand jury testimony of the witness and that which she might have testified to here.
>
> The COURT. Mr. Bailey has announced the correct procedure under the cases. First, it would have to be examined by me to determine.
>
> Mr. McDONNELL. Well, then, I request the court to examine them.

After an *in camera* inspection of the grand jury minutes, the trial court denied the motion for production, noting in passing that there was no material discrepancy between the witness' testimony at trial and that before the grand jury (Tr. 913–914).

Contrary to petitioners' contention, *Dennis* v. *United States,* 384 U.S. 855, does not require automatic production of grand jury minutes without a showing of "particularized need" as required by *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395. This Court carefully pointed out in *Dennis* that the trial judge retains the function of "* * * deciding whether a case has been made for production * * *" (384 U.S. at 875). In this case, as clearly reflected in the above colloquy, defense counsel merely hoped that there would be useful information in the grand jury minutes, and did not show any "particularized need" which outweighed the policy of secrecy of the grand jury minutes.

Witness Greenlaw's testimony in no way related to the conduct of petitioners Cowan and De Pietto, and her testimony concerned only two transactions with petitioner Cole and three transactions with petitioner De Maro. One of the transactions with Cole was

corroborated by her husband, Robert Greenlaw (Tr. 1006–1009), as was one of the transactions with De Maro (Tr. 1010–1011). The slight discrepancy of dates between the testimony of Beulah Greenlaw and the corroborating testimony of her husband does not of itself entitle petitioners to discovery of the grand jury minutes, especially where there was no material discrepancy between the substance of the described transactions.[3] Moreover, the testimony of Beulah Greenlaw was by no means critical to the government's case. The record is replete with similar testimony showing petitioners Cole and De Maro to be involved in a conspiracy to traffic in narcotics (*e.g.*, Tr. 479–480, 934–943, 1124–1126, 1152–1153, 2395–2398, 2403–2404, 2415–2419, 2435–2437; 3706–3708, 3993–4000, 4073–4074). Under these circumstances, the failure of the trial judge to turn over the grand jury minutes did not constitute reversible error. Compare *Dennis* v. *United States, supra,* at 872–873.

4. On October 25, 1963, at about 9 p.m., a federal agent saw Joe Battiato drive up to his residence with one Nolan Mack, go to his apartment and return and give a brown paper bag to Mack, who then drove off (Tr. 3855–3856.)

At approximately 9:20 p.m., agent Ruhl, who had sttationed himself near Mack's residence, observed Mack

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[3] Beulah Greenlaw testified that she dealt with Charles Cole in the middle of July, 1960, and with Mike De Maro in the early part of August, 1963. Her husband testified that she met Cole in August, 1960, and that she met De Maro in the late part of August, 1963.

drive by. When Mack spotted agent Ruhl, he accelerated his vehicle, and Ruhl gave chase. Midway through a high-speed chase, Ruhl observed Mack shake a white powder out the car window and throw an unidentified object from the car. Eventually, Mack halted his vehicle. After Ruhl identified himself and advised Mack that he was under arrest, a gun battle ensued, in which Mack was fatally wounded (J.A. 324–327). Approximately five minutes later, agent Halpen arrived and, after attending to agent Ruhl, who also had been seriously wounded, examined Mack's vehicle. A white powder found on the arm of the door and on the floor was later identified as heroin (J.A. 280).

The only question concerning the admissibility of this testimony is one of relevancy. Whether the conspiracy had terminated, as suggested by petitioners, need not be determined, since *acts* of a co-conspirator, which are relevant to the proof of the conspiracy, are admissible against all conspirators, even though the conspiracy has ended. *Lutwak* v. *United States*, 344 U.S. 604, 617–618. In the present case, testimony relating to the chase and capture of Nolan Mack was clearly relevant to proof of the conspiracy. Evidence showed that Battiato, a co-conspirator, had given Mack a paper bag, the contents of which were unknown. When Mack was finally apprehended, heroin was found in his car, but there was no evidence of a paper bag. In order to account for the absence of the paper bag, and the possible chain of possession of the heroin from Battiato to Mack, testimony that an object was thrown from the vehicle by Mack was

clearly relevant. It was within the discretion of the trial court to conclude that the relevancy of such evidence outweighed any possible prejudice that might result from its admission. *Hardy* v. *United States*, 335 F. 2d 288 (C.A.D.C.).

5. During the latter months of 1961, federal narcotics agent Dayle coordinated his investigative activities through two government informers, Aubrey Gibson and Houston Garner. Through them, Dayle learned that Opal Cole and her brother LaFauncie Johnson, who both used an apartment at 8213 South Cottage Grove, were distributors of heroin (*e.g.*, Tr. 514–517, 526–527, 549–551, 555–563, 566–570).

On December 12, 1961, after Dayle had gathered this information, an indictment was filed against Opal Cole and LaFauncie Johnson, *inter alia*, charging several narcotics violations (Tr. 688, 706). On that same day, Dayle was informed that bench warrants had issued for the arrest of Cole and Johnson (Tr. 706), and he directed agent Hughes to proceed to 8213 South Cottage Grove to effect their arrests (Tr. 717). Hughes arrested Opal Cole at her dress shop, which is located approximately four lots away from her residence (Tr. 719). After conducting a search of the dress shop, Hughes, some local officers, and Opal Cole continued to 8213 South Cottage Grove to effect the arrest of LaFauncie Johnson (Tr. 719). Using Opal Cole's key to gain entrance to her apartment, Hughes arrested LaFauncie Johnson, who was found in the living room (Tr. 720–721). The apartment was then searched, and an address book, which contained the

name of petitioner De Maro, was found in the top drawer of a bureau in a bedroom (Tr. 723).

The trial court denied a motion to suppress the address book, filed by Opal Cole and joined in by the others, on the ground that the search was proper as incident to the arrest of LaFauncie Johnson (Tr. 762). The court of appeals affirmed that ruling.

Although neither Opal Cole nor Johnson is before this Court,[4] petitioners in No. 701 contend that the address book was improperly admitted in evidence. As the courts below held, however, the seizure was proper under well established principles. When agent Hughes arrived at the apartment and arrested LaFauncie Johnson pursuant to the warrant, he was well informed that both Cole and Johnson were in the business of distributing narcotics. It was therefore reasonable for him to search the apartment, occupied by Opal Cole and Johnson, incident to the arrest of Johnson. *United States* v. *Rabinowitz,* 339 U.S. 56; *Harris* v. *United States,* 331 U.S. 145. The address book found in the search identified another member of the conspiracy, Mike De Maro, who was Opal Cole's supplier. Since Opal Cole was in the business of distributing narcotics, this address book indicating the address of other business connections was properly seized as part of the equipment used to commit the offense of distributing narcotics. *Marron* v. *United States,* 275 U.S. 192, 199; *Abel* v. *United States,* 362 U.S. 217, 237.

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[4] At the time of the search of the apartment, petitioner Charles Cole was divorced from Opal Cole, and he had no interest in the searched apartment (Tr. 2693–2695, 4979–4980).

In any event, the address book only served to establish that there was some relationship between De Maro and Opal Cole, and was cumulative to other testimony that Opal Cole kept De Maro's name in an address book (Tr. 2407).

6. Petitioner Cole's attack on the sufficiency of count 39 of the indictment, in which he alone was named, need not be considered, since his conviction on the conspiracy count alone will support the general sentence imposed. *Claasen* v. *United States*, 142 U.S. 140; *Barenblatt* v. *United States*, 360 U.S. 109, 115.

In any event, the count sufficiently alleged an offense under 18 U.S.C. 1403. It charged as follows (J.A. 31):

> During or about the month of August, 1960, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, and within the jurisdiction of this Court, the defendant, CHARLES COLE, used a communication facility, to wit, a telephone in committing and in causing and facilitating the commission of, and in attempting to commit, an offense, the penalty for which is provided in Title 21, Section 174, United States Code, in violation of Title 18, Section 1403, United States Code.

The indictment thus informed petitioner that he was charged with using the telephone to facilitate narcotics transactions in Chicago in August, 1960. The fact that it did not specify the particular aspect of 21 U.S.C. 174 which was violated is unimportant, since the use of the telephone to assist any violation of 21 U.S.C. 174 falls within the interdiction of 18 U.S.C. 1403. There is no showing that petitioner was

prejudiced in his defense by the failure of the indictment to specify more exactly the date of the call or to whom the telephone call was made. To the extent that the indictment was broader than it had to be,[5] petitioner was benefitted, from the standpoint of protection against double jeopardy, for he could not again be prosecuted for any telephone calls in aid of narcotics transactions to anyone during the whole period covered by the indictment.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
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DECEMBER 1966.

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[5] One Mildred McLean testified that, in August 1960, petitioner Cole telephoned her, in connection with a narcotics transaction, and told her "to tell Virge to hurry up with the money, because people was (sic) breathing down his neck" (Tr. 1160).

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In the

Supreme Court of the United States

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ANGELO PASSINI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CHARLES COLE, JESSE COWAN and AMERICO DePIETTO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

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MIKE DE MARO,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR REHEARING OF ORDER DENYING PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that this Court grant rehearing of its orders of January 16, 1967 denying the Petitions for Writ

of Certiorari, and that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled cause as prayed in the petitions filed herein on October 14, 19, November 7, 1966.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

SINCE THE FILING OF THE INSTANT PETITION FOR CERTIORARI, THE FOLLOWING HAS OCCURRED, WHICH WE RESPECTFULLY SUBMIT WARRANTS THE COURT'S RECONSIDERATION OF THE INSTANT PETITIONS:

A. In *Hayden* v. *Warden of Maryland Penitentiary,* 363 Fed. (2) 647, it was held that clothing seized from the defendant's home when he was arrested there shortly after the commission of a robbery were "of only evidentiary value," and not subject to a lawful seizure. Hayden is a principle authority relied upon in the instant petition for granting certiorari. Subsequent to the filing of the instant petition, this Court granted certiorari in *Hayden,* (11/7/66), 17 L.Ed. (2) 210, 87 S.Ct. 290, and *Hayden* is now pending before this Court for oral argument and decision. We respectfully submit that the instant petitions, where address books, "of only evidentiary value," were seized, and such seizure was held to be valid by the Seventh Circuit Court of Appeals, is the ideal companion case to *Hayden,* where seized clothing was held by the Fourth Circuit Court of Appeals to be "of only evidentiary value," and not subject to lawful seizure.

B. Nor had this Court decided, when the instant petitions were filed, *Lewis* v. *U.S.,* (12/12/66), 17 L.Ed. (2) 312, in which the Court stated, 17 L.Ed. (2) 312, p. 316, that *"an agent is (not) authorized to conduct a general search for incriminating materials. . ."*

C. At the time the instant petitions for writ of certiorari were filed, this Court had not decided *Hoffa* v. *United States* (12/12/66), 17 L.Ed.(2) 374, 87 S.Ct., in which Mr. Justice Stewart, expressing the views of the majority, stated, (17 L.Ed. (2) 374, 381-382) that, when a citizen, "puts something in his . . . desk drawer . . . he has the right to know it will be secure from an unreasonable search. . . *So it was that the Fourth Amendment could not tolerate the . . . purloining of the petitioner's private papers in Gouled,* (255 U.S. 298)."

D. Mr. Chief Justice Warren, Mr. Justice Fortas and Mr. Justice Brennan were of the opinion that the instant petitions for certiorari should be granted. The above quoted language in *Hoffa* of Mr. Justice Stewart, who did not dissent from the denial of the instant petitions, we submit, fortifies our position in the case at bar. So does the following expression from the dissenting opinion of Mr. Justice Douglas in *Osborn* v. *U.S.*, 17 L.Ed. (2) 394, P. 411, decided December 12, 1966, also after the instant petitions were filed. Mr. Justice Douglas, after quoting from *Boyd* v. *U.S.*, 116 U.S. 616, 29 L.Ed. 746, P. 751, stated:

> *"Today a search that respects all the procedural proprieties of the Fourth Amendment is nonetheless unconstitutional if it is a 'search' for testimonial evidence."* (Italics ours)

Mr. Justice Douglas likewise did not dissent from the denial of the instant petitions for certiorari. The search for and seizure of the address books in the instant case extorted "testimonial evidence," compelled self-incrimination and violated the Fourth and Fifth Amendments. The holding of the Court of Appeals in the instant case is diametrically opposed to, inconsistent with, and repug-

nant to the foregoing expressions and holdings of *Hoffa, Osborn, Lewis* and *Hayden.*

E. Trial Courts are consistently expressing confusion and dubiousness as to this Court's holding in *Dennis* v. *United States,* 16 L.Ed. 2d 973 of a defendant's right to the production and examination of government trial witnesses' grand jury testimony. No ambiguity exists among these writers regarding the Court's holding in *Dennis.* Most assuredly, ambiguity was not the basis for the Second Circuit Court of Appeal's complete disregard of *Dennis* in *U.S.* v. *Ulman,* (decided October 27, 1966, published January 16, 1967,) 368 Fed. 2d 725, 730, after the filing of the instant petitions. Nor was ambiguity the basis for the Seventh Circuit Court of Appeals' failure to follow, distinguish, discuss or cite *Dennis* in the case at bar, a judicial breach, we submit, of extreme magnitude. Perhaps it was the Court of Appeals' ignoring *Dennis,* or the *Dennis* holding itself that induced the lapse of memory of three narcotics agents, as to whether they testified before the Grand Jury, in the trial of *U.S.* v. *Irving Napue,* 66 CR 41, in the United States District Court for the Northern District of Illinois, Eastern Division at Chicago, Illinois on November 28-29, 1963,[1] subsequent to the filing of the instant petitions. Although the Assistant U. S. Attorney informed the trial court that he could determine from the Grand Jury minutes and his office whether they did so testify, (App. A 175, 19, 25) defense counsel's motion that the Court order him to make such determination was overruled, (App. A, pp. 6, 17, 19, 30). The Court expressed a reluctance not to order production of the

[1] This portion of the certified transcript of said trial is submitted herewith as Appendix A. Attorney Pincham on the instant petition was also the Attorney for the defendant, Napue, on said trial.

Grand Jury testimony and suggested to the U. S. Attorney that production was feasible and practical (App. A 30-31). Nevertheless, the Court, in *Napue*, denied defense counsel's motion that the government witness' Grand Jury testimony be produced (App. A, 30). The trial judge was dubious of the defendant's right thereto. This ambiguity, we respectfully submit, should be here rectified and "at the earliest opportunity." *Mesarosh* v. *U.S.*, 1 L.Ed. (2) 1, 9.

F. Again, uncertainty of the *Dennis* holding was clearly expressed by the trial judge in *U.S.* v. *Segaviano, et al.*, No. 66 CR 371, in the U. S. District Court for the Northern District of Illinois, Eastern Division, on trial January 31-February 6, 1967.[2] First, the trial court accused defense counsel of intellectual dishonesty in his interpretation of the *Dennis* holding, (App. B 1-22). Second, the trial court interpreted the *Dennis* holding to be premised on (1) the lapse of time between the alleged offense and the witnesses' trial testimony; (2) that the witnesses were accomplices, rather than police officers; (3) that the charge was a conspiracy; (4) that the witnesses' trial testimony was of conversations with the defendants, rather than acts; and (5) the witnesses admitted some mistakes in their trial testimony (App. B, 15-17). Surely this Court did not intend to confer upon an accused a right premised upon such discriminate factors, none of which the accused could remotely control. And when defense counsel pointed out that none of the aforementioned factors existed in *Worthy* v. *U.S.*, 352 Fed. (2) 718, which this Court remanded, 16 L.Ed. (2)

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[2] This portion of the certified transcript of said proceedings is also submitted herewith as Appendix B. Attorney Pincham was also the defendant, Segaviano's Attorney on said trial.

1000, in the light of *Dennis*, (App. B, 19-20, 24-25), the trial court then agreed that defense counsel's interpretation of the *Dennis* holding was correct, (App. B, 40-42). But upon the Court ordering that the government witnesses' Grand Jury testimony be produced to defense counsel, (App. B, 46), the government objected on the basis of the trial court's subsequent holding in *National Dairy Products Co.* v. *U.S.*, 350 Fed. (2) 321, (App. B, 46-47), after remandment by this Court in the light of *Dennis*, 16 L.Ed. (2) 993. The trial court thereupon again reversed itself and denied defendant's motion for production, (App. B, 59), but subsequently granted it under unwarranted certain restrictions, the portion of which proceedings has not yet been transcribed.

It is respectfully submitted that the foregoing trial court proceedings and expressed ambiguity as to the *Dennis* holding, all of which occurred after the instant petitions for certiorari were filed, warrant this Court in reconsidering the order denying the instant petitions and in allowing the issuance of the writ. We importune this Court so to do. Apparently, clarification of *Dennis* is sorely needed for the benefit of trial courts as well as the Courts of Appeals for the Second and Seventh Circuit.

CONCLUSION

For the reasons set forth above and in the petitions for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Counsel for Petitioners

CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

Counsel for Petitioners